

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE COMPLAINT BY)	
VERIZON DELAWARE INC. AGAINST)	
CAVALIER TELEPHONE MID-ATLANTIC, LLC,)	PSC COMPLAINT DOCKET
CONCERNING CUSTOMER WINBACK AND)	NO. 330-04
PERFORMANCE ASSURANCE CHARGES)	
(FILED JULY 13, 2004))	

IN THE MATTER OF THE TARIFF FILING BY)	
CAVALIER MID-ATLANTIC, LLC, TO INTRO-)	PSC DOCKET NO. 03-390T
DUCE THE UNE LOOP SUPPORT SERVICE)	
LANGUAGE (FILED SEPTEMBER 9, 2003))	

ORDER NO. 6497

This 9th day of November, 2004, the Commission determines and Orders the following:

1. On September 19, 2003, Cavalier Telephone Mid-Atlantic, LLC ("Cavalier") amended its Delaware Tariff No. 1 to, in part, include a new § 5.9, entitled "Cavalier UNE Loop Support Service." The new services falling under such heading are identified as: "Winbacks," "Premise Visit - New Loops and Hot Cuts," "Missed Appointments," and, "Premiere Visit - Maintenance."¹ Under Rule 5(a) of the Commission's

¹Cavalier describes the "winback" services and rates as charges to compensate Cavalier for tasks performed when a Cavalier customer switches retail service to Verizon Delaware Inc. ("VZ-DE"). Cavalier represents that its "winback" charge mirrors the rate VZ-DE currently charges Cavalier for switching a customer utilizing a VZ-DE loop from being a VZ-DE retail customer to becoming a Cavalier retail customer. Cavalier captures the other services described in § 5.9 under the label "truck rolls." It explains that the charges represent the costs incurred by Cavalier when it must dispatch a technician (and truck) to a customer's premise to discern and remedy a particular service-affecting problem with a "loop" provided by VZ-DE. According to Cavalier, the truck rolls under the "Premise Visit - New Loops and Hot Cuts," and "Missed Appointments" categories are billed to VZ-DE in instances when the "cut-over" of a customer's loop from being a VZ-DE customer to a Cavalier customer either is not fully successful or is not completed because of VZ-DE's failure to timely appear at a jointly agreed-upon appointment time. The "Premise Vist-Maintenance" category applies to

*"Rules for the Provision of Telecommunications Services,"*² these tariff revisions (encompassing the new UNE Loop Support Services with its several attendant charges) became operative on September 19, 2003.

2. On July 13, 2004, VZ-DE filed a complaint with the Commission challenging all the services and charges listed under the UNE Loop Support Service grouping in Cavalier's Tariff. Initially VZ-DE asserts that the tariff is impermissibly vague about when, and against whom, the services and charges apply. VZ-DE also argues that the rates (and in fact the underlying services) imposed under § 5.9 are unjust, unreasonable, and discriminatory, and thus contravene 26 Del. C. § 303(a). Finally, VZ-DE asserts that the "winback" and "truck roll" activities described in Cavalier's tariff relate to obligations between these two carriers under the interconnection and unbundling regime prescribed by the 1996 federal Telecommunications Act. Thus, VZ-DE says, the terms for such services should have been included in the two carriers' interconnection agreement. Because the current Cavalier/VZ-DE contract does not include these charges, Cavalier cannot, VZ-DE asserts, now impose them via its State tariff. Similarly, VZ-DE asserts, that its performance in fulfilling its unbundling obligations (including its provisioning of loops) is already measured via Carrier-to-Carrier Guidelines and deficiencies enforced via the Performance Assurance Plan mechanism. Cavalier's

instances where a technician visits a customer's premise for maintenance and repair of a defective "loop." Cavalier's Resp., Intro. at nn. 2 & 3; §§ B & C. (filed August 24, 2004).

²Adopted in Findings, Opinion, and Order No. 5833 (Nov. 6, 2001) ("Telephone Rules").

"truck roll charges," VZ-DE says, seek to impose additional penalties outside those documents. VZ-DE asks the Commission to promptly suspend § 5.9 of Cavalier's Delaware Tariff No. 1, and, after conducting a proceeding, to strike such section (and the services listed there). In addition, VZ-DE requests a refund of the charges it has already paid to Cavalier for the "services" described in § 5.9. In support of its complaint, VZ-DE cites to proceedings in New York and Pennsylvania where tariff filings seeking to implement similar charges for "winback" services performed by competitive local exchange carriers have either been rejected or questioned - and then withdrawn.³

3. At the direction of the Secretary, Cavalier filed an answer to the complaint. As support for its § 5.9 "services" and "charges," Cavalier refers to a recent decision of the Federal Communications Commission ("FCC") in a Virginia arbitration proceeding where that Commission (at its bureau level) allowed Cavalier to include similar "winback" charges in its interconnection agreement with Verizon Virginia Inc.⁴ In a subsequent reply, VZ-DE argues that this bureau

³Complaint of Verizon New York Inc. Concerning Customer Transfer Charges Imposed by TC Systems, Inc., Order Granting Verizon's Petition and Complaint (NY PSC Feb. 13, 2004) (rejecting another CLEC's "customer transfer charge"); Pennsylvania PUC v. TCG Delaware Valley, Inc., Order (PA PUC Dec. 20, 2002) (suspending another CLEC's "customer transfer charge" to await either the withdrawal of the filing or further PUC investigation). See also Staff Letter to Cavalier Telephone, LLC (VA SCC Jan. 27, 2003) (rejecting similar Cavalier tariff filing in Virginia on the basis that its provisions were vague and that carrier-to-carrier charges should be included as part of carriers' interconnection agreement).

⁴Petition of Cavalier Telephone, LLC, Pursuant to Section 252(e)(5) of the Communications Act for the Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. for Arbitration, Mem. Op. & Order, 18 FCC Rcd. 25, 887 (WCB Dec. 12, 2003), agreement approved, 19 FCC Rcd. 4070 (WC 2004), petition for

decision at the FCC is neither binding nor persuasive, and that, in any event, a tariff is not the appropriate vehicle to impose such charges on an incumbent local exchange carrier, such as VZ-DE.

4. The Commission believes that the diversity of the rulings from other jurisdictions concerning similar types of services and charges provide grounds for the Commission to now undertake an investigation of Cavalier's state tariff revisions instituting its "UNE Loop Support Services," as well as the particular charges attached to each of those services. Thus, pursuant to Rules 5(d) and 11 of the Telephone Rules, the Commission now undertakes an investigation of the § 5.9 services and charges in Cavalier's tariff. Pursuant to those rules, as well as Rule 17(b) of the Commission's *Rules of Practice and Procedure* and 26 Del. C. § 502, the Commission now refers this matter to a Hearing Examiner for further proceedings focusing on the reasonableness of Cavalier's § 5.9 services and charges. Because the issues may be many, a summary disposition cannot now be had. Not only do the pleadings pose the question of the appropriate charges, if any, for "winback" services and the particular "truck rolls," but also call for an inquiry into whether a State tariff is an appropriate vehicle to implement such charges. The Hearing Examiner should conduct the proceedings to fully, and fairly, explore the issues surrounding the § 5.9 services and charges. After

recon. pending. The Commission notes that the FCC in its Virginia arbitration order did not adopt Cavalier's "truck roll" charges. Instead, it directed that the interconnection agreement include terms that would require Verizon to construct and implement a cooperative testing program for loop installations. In its response to VZ-DE's complaint here, Cavalier alleges that Verizon has failed to implement such testing methods in Virginia.

doing so, he can then provide the Commission with a Report of his findings and a recommended decision.

5. At the same time, the Commission will now direct that the charges for the services set forth in § 5.9 of Cavalier's tariff shall be subject to refund. Cf. 26 Del. C. § 306(a)(2). Thus, if the Commission might later finally determine that the § 5.9 services are inappropriate, or the related charges unreasonable in whole or in part, then Cavalier will be obligated to refund the unreasonable § 5.9 charges collected after the date of this Order. The effective date of this refund obligation is the date of this Order. At the same time, the Commission prefers a prompt resolution of this dispute. Thus, the Commission directs the Hearing Examiner to set a schedule that will allow the Commission to make a final decision on the validity and reasonableness of the § 5.9 services and charges within seven months.

6. Finally, if the Hearing Examiner should recommend that the Commission find the § 5.9 services and charges invalid or unreasonable, in whole or in part, he should also include in his Report his view - after hearing from the parties - whether VZ-DE is entitled to "refunds" for § 5.9 services billed prior to the effective date of the refund risk imposed by this Order.

Now, therefore, **IT IS ORDERED:**

1. That, for the reasons stated in the body of this Order, and pursuant to Rules 5 and 11 of the Commission's "*Rules for the Provision of Telecommunications Services*," the provisions of § 5.9 of Delaware Tariff No. 1 of Cavalier Telephone Mid-Atlantic, LLC, as were previously allowed to go into effect in PSC Dckt. No. 03-390T, are

hereby now set for investigation into whether such services and charges are lawful, reasonable, and appropriate. The charges associated with the services described in such section are hereby made subject to refund pending a final decision of the Commission concerning the validity and reasonableness of those services and charges. Such refund risk shall be effective November 9, 2004.

2. That, pursuant to 26 Del. C. § 502, this matter is referred to Senior Hearing Examiner William F. O'Brien to conduct the appropriate proceedings to determine the validity and reasonableness of § 5.9 of Delaware Tariff No. 1 of Cavalier Telephone Mid-Atlantic, LLC. Hearing Examiner O'Brien shall conduct such proceedings, including evidentiary hearings, as he might deem appropriate, in order to compile a full record in this matter. At the conclusion of such proceedings, Hearing Examiner O'Brien shall make a Report to this Commission containing his proposed findings and recommended decisions. Hearing Examiner O'Brien is specifically delegated the authority, under Rule 21 of the Commission's *Rules of Practice and Procedure*, to grant or deny petitions to intervene. Hearing Examiner O'Brien is also delegated the authority, pursuant to 26 Del. C. § 102A, to determine the need for, the manner, and content of any public notice.

3. That Hearing Examiner O'Brien shall endeavor to conduct the proceedings and file his report so that the Commission may enter a final decision in this matter within seven months from the date of this Order.

4. That Verizon Delaware Inc. and Cavalier Telephone Mid-Atlantic, LLC, are hereby put on notice that they will be charged the costs of this proceeding under 26 Del. C. § 114(b).

5. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joshua M. Twilley
Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Donald J. Puglisi
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Norma J. Sherwood
Acting Secretary